No. 11,088

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, Executor of the Estate of Margaret Eyre Girvin, Deceased,
Respondent.

On Petition for Review of the Decision of the Tax Court of the United States.

PETITION OF RESPONDENT FOR A REHEARING.

ALLEN G. WRIGHT,
Mills Building, San Francisco 4,
EDWARD HALE JULIEN,
Mills Building, San Francisco 4,
Attorneys for Respondent.

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To the Honorable Francis A. Garrecht, Presiding Judge, and to the Honorable Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes The Bank of California National Association Executor of the Estate of Margaret Eyre Girvin, deceased, respondent in the above entitled proceeding, by its attorneys, Allen G. Wright and Edward Hale Julien and respectfully shows:

I.

REQUEST FOR REHEARING.

The aforesaid respondent seeks and hereby petitions for a rehearing of the issues in the above entitled proceeding and of the decision and judgment of this Honorable Court thereon rendered in said proceeding on the 11th day of April, 1946.

II.

GROUNDS FOR REHEARING.

The grounds for requesting said rehearing are that this Honorable Court, it is respectfully suggested, has erred in its decision and judgment as follows:

1. In erroneously assuming or concluding that the decision of the Supreme Court in *May v. Heiner,* 281 U. S. 238, 50 Sup. Ct. 286, has been overruled by the Supreme Court either expressly or by necessary implication, or otherwise.

2. In erroneously assuming or concluding that the facts of the instant case are not in all essentials substantially similar to the facts in said case of *May v. Heiner,* or that they do not bring it within the compass of that case.

3. In erroneously assuming or concluding that there were no distinctions of substance between the facts in such cases as *Klein v. United States,* 283 U. S. 231, 51 Sup. Ct. 398; *Helvering v. Hallock,* 309 U. S.

106, 60 Sup. Ct. 444; *Fidelity Co. v. Rothensies,* 324 U. S. 108, 65 Sup. Ct. 508; *Commissioner v. Field,* 324 U. S. 113, 65 Sup. Ct. 511, on the one hand and *May v. Heiner,* supra; *Hassett v. Welch,* 303 U. S. 303, 58 Sup. Ct. 508; *Commissioner v. Kellogg,* 119 Fed. (2d) 54; *U. S. v. Brown,* 134 Fed. (2d) 372; *Commissioner v. Irving Trust Co.,* 147 Fed. (2d) 946, and the instant case on the other hand, such as would justify an affirmance of the decision herein of the tax court; and

4. In erroneously assuming or concluding that those provisions of section 81.17 of Treasury Regulations 105 upon which said court relied in justification of its decision herein applied to the trust in the instant case, created prior to the amendments of 1931 and 1932 to the Revenue Act of 1926.

III.

ARGUMENT.

The respondent respectfully suggests that the trust created in this case in 1924 is indistinguishable from the trust in *May v. Heiner,* supra, and that the trust in this case, like the trust in *May v. Heiner,* having been made prior to the amendments in 1931 and 1932 to section 203(c) of the Revenue Act of 1926 (Joint Resolution of March 3, 1931, Ch. 454, 46 Stat. 1516; Revenue Act of 1932, section 803(c)) is governed by the law as declared in *May v. Heiner* (*Hassett v.*

Welch, 303 U. S. 303, 58 Sup. Ct. 559), and not by the law as amended since 1931 or 1932.

Commissioner v. Irving Trust Co., 147 Fed. (2d) 946, Circuit Court of Appeals for the Second District.

The respondent suggests further that while the provisions of section 81.17 of Treasury Regulations 105 may justify the inclusion in the gross estate of a decedent, for purposes of assessing an estate tax, the *corpus* of a trust created subsequently to the 1931 and 1932 amendments to section 203(c) of the Revenue Act of 1926, where the decedent has reserved a life estate in the trust property, those provisions are not intended to apply to such a trust when created prior to the said 1931 and 1932 amendments. If, on the contrary, the Commissioner by the provisions aforesaid intended to make them applicable to such a trust as that in the present case, he is flouting *May v. Heiner,* and attempting by regulation to accomplish a purpose not authorized to him by law.

The Supreme Court has twice declared, once in 1930 and again in 1938, that the *corpus* of such a trust as that in the instant case, cannot, for purposes of the estate tax, be included in the gross estate of the deceased settlor where the trust was created prior to the aforesaid amendments of 1931 and 1932 to the Revenue acts (*May v. Heiner,* supra, and *Hassett v. Welch,* supra). The Supreme Court has not expressly overruled either *May v. Heiner* or *Hassett v. Welch.* The respondent suggests that, as this court itself

said, in *United States v. Brown,* supra, the Supreme "court did not expressly or by necessary implication overrule it (*May v. Heiner*) in *Helvering v. Hallock,* 309 U. S. 106, 60 Sup. Ct. 444." If the Supreme Court did not overrule *May v. Heiner* in *Helvering v. Hallock* it did not overrule *May v. Heiner* in *Klein v. United States,* supra, or in *Fidelity Co. v. Rothensies,* supra, or *Commissioner v. Field,* supra. In all of these cases there was present the "string" attached to the trust conveyance by the settlor that in the opinion of the Supreme Court justified the tax and gave to the instrument a testamentary character and the so-called "string" was more than a "mere possibility" it was in each case something of substance, not quite as tenuous as the term "string" might suggest. A reversion is an estate, a thing of substance.

Mrs. Girvin had no reversion in the instant case either in her lifetime or at the date of her death.

A right to amend or revoke a trust or a reserved power of appointment or the retention of a reversion, under certain conditions, would give to a transfer in trust an ambulatory quality that would justify regarding it as testamentary in character. But the transfer in trust in the case of *May v. Heiner,* said the court in that case, was not testamentary in character and neither was Mrs. Girvin's transfer in trust testamentary in character. A possibility of reverter, if any, in the case of *May v. Heiner* as in this case did not pass to the living upon the death of the settlor in either case. Mrs. Girvin's children did not

acquire a possibility of a reverter upon their mother's death. As the Supreme Court properly and accurately described it in *May v. Heiner,* "The interest therein which she possessed immediately prior to her death was obliterated by that event." And in the case of Mrs. Girvin as in the case of Pauline May, to quote again from the court in *May v. Heiner,* at her death, "no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed."

When Mrs. Girvin's deed was executed in 1924 the entire legal title to the property vested in her trustee, The Bank of California N. A. (Sec. 863 California Civil Code.) Equitable estates in remainder at the same time vested in Richard Girvin and his sister Lee Girvin Tevis (*Title Ins. & Trust Co. v. Duffill,* 191 Cal. 629), subject only to possible divestiture in the event of the death of either in the lifetime of Mrs. Girvin. As they both outlived their mother, the equitable estates vested in them in 1924 were on her death no longer subject to divestiture in favor of their respective issue.

It is still conceivable that the Supreme Court has properly hesitated to declare that such a tax exaction as the Commissioner claims here could apply to any trust created prior to the 1931 and 1932 amendments to the Revenue Act of 1926, unless something of real rather than fancied substance could be found as a justification, some "string" like an express provision for a reversion, or the reservation of a power of appointment, or of amendment or revocation, fairly im-

pressing the original transfer with a testamentary character. In the *Klein* and *Hallock* cases the reversions were expressly provided for in the instrument creating the trust, in the *Fidelity* case a power of appointment was reserved which could change the beneficiaries taking upon the expiration of the life estate and in the *Field* case there was expressly reserved a power of appointment and a reversion.

Unless the Supreme Court has in effect overruled *May v. Heiner* and *Hassett v. Welch,* it is again respectfully suggested that this court is in error in its recent decision of the instant case.

The Supreme Court takes pride in distinguishing itself from the British House of Lords, by asserting that unlike that House, it "has from the beginning rejected a doctrine of disability at self correction." (*Helvering v. Hallock,* supra, at p. 121.) If the court had felt any inconsistency between its decisions in the *Hallock* case or in the *Fidelity Co. or Field* cases relied upon by the Government in this case and its decisions in *May v. Heiner* and *Hassett v. Welch,* it would, in all probability, have announced that those decisions were no longer the law. If there is any doubt about the construction of a taxing statute that doubt, on the authority of the Supreme Court, should be resolved in favor of the taxpayer and not in favor of the Government. (*Hassett v. Welch,* supra, and cases there cited.)

Much as the Congress may have disliked the decision in *May v. Heiner,* by their aforesaid amend-

ments of 1931 and 1932 to the Revenue Act of 1926 the Congress did not attempt anything other than a prospective operation therefor. Had the Congress intended otherwise they knew how to word their legislation to effect their object, as witness the following provisions in Section 402(c) of the Revenue Act of 1918, which read:

> "To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has *at any time* created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (*whether such transfer is made or created before or after the passage of this Act*) except in case of a bona fide sale for a fair consideration in money or money's worth." (Emphasis ours.)

The Congress by confining the effect of said amendments of 1931 and 1932 to a prospective operation only, accepted the construction of the Revenue Law in *May v. Heiner.* Can it be expected that the Supreme Court will now overrule *May v. Heiner* and thus effect by judicial legislation what Congress refrained from attempting? The doubt as to such a decision on the part of the Supreme Court is, it is suggested, at least a reasonable one.

Finally attention is invited to the case of *Commissioner v. Irving Trust Co.,* supra, a case whose facts are substantially similar to the instant case and where the trusts reserving income for life to settlor were created prior to the 1931 and 1932 amendments to the Revenue Act of 1926. In that case the court found

these trusts not includible in the gross estate of the decedent settlor for estate tax purposes and found nothing in *Fidelity-Philadelphia Trust Co. v. Rothensies,* supra, inconsistent with its position.

In conclusion it is suggested that the factor of taxability in the instant case is governed by the provisions of Section 302 (c) and (d) of the Revenue Act of 1924 and not by the provisions of I.R.C., Section 811 (c) and that it is not governed by any treasury regulations which grew out of later statutes and which are not warranted or authorized by the Revenue Act of 1924.

Dated, San Francisco,
May 6, 1946.

Respectfully submitted,
ALLEN G. WRIGHT,
EDWARD HALE JULIEN,
Attorneys for Respondent.

CERTIFICATE OF COUNSEL.

I, Allen G. Wright, one of the attorneys for the respondent in the above entitled proceedings, do hereby certify that the foregoing petition for a rehearing is not interposed for delay and that in my judgment it is well founded.

Dated, San Francisco,
May 6, 1946.

ALLEN G. WRIGHT,
Of Counsel for Respondent.